IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1822

MATTHEW MADONNA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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June 21, 1977

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MATTHEW MADONNA,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Matthew Madonna respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction entered against the petitioner by the United States District Court for the Southern District of New York.

Opinions Below

The Court of Appeals did not render an opinion but delivered a statement that appears in the Appendix hereto at pp. 1a-4a. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The date of the judgment of the United States Court of Appeals for the Second Circuit was April 4, 1977, which was also the date of entry. A timely petition for rehearing en banc was denied on May 27, 1977. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Whether the defendant's right to testify was improperly chilled by a ruling that a twenty-two year old homicide conviction could be used to impeach him.

2. Whether a declaration evincing the defendant's innocent state of mind was improperly held to be inadmissible hearsay.

3. Whether the defendant's right to confrontation was denied by excluding business records that might have shown a vital portion of the testimony of the chief prosecution witness to be false.

4. Whether the defendant was unfairly prejudiced and denied due process by the admission of evidence of a prior similar act.

Constitutional and Statutory Provisions Involved in the Case

1. United States Constitution, Amendment V: . . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.

2. United States Constitution, Amendment VI: In all criminal prosecutions, the accused shall enjoy the right

. . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

3. Federal Rules of Evidence, Rules 609(a); 801(c); 803(3) and 803(6). See Appendix pp. 5a-6a.

Statement of the Case

The petitioner Matthew Madonna was tried in the Southern District of New York before the Hon. Robert L. Carter and a jury and was convicted on one count of possession of heroin with intent to distribute it and one count of conspiracy to possess and to import heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 952(a). He was sentenced to the maximum term of fifteen years on each count, the terms to run consecutively.

No testimony or other evidence directly implicated Madonna. Everything turned on whether a car that he had rented in a false name was used with his knowledge for the purpose of transporting heroin. A friend of Madonna's, the co-defendant Larca, had loaned the car to one Boriello who had picked up heroin and put it in the trunk of the car. Boriello was then arrested and later, under the control of the authorities, he drove the car to a street corner in Manhattan where Larca and Madonna met him and took charge of the car. At this point Larca and Madonna were arrested.

Whether Madonna had prompted Larca to lend the car to Boriello and why Madonna was at the Manhattan rendezvous to take back the car were thus the crucial, indeed the only issues in the case as to Madonna. Boriello, the principal witness for the prosecution, strongly implicated Larca but offered absolutely no testimony inculpatory of of Madonna. Nor did any other participant in the venture

implicate Madonna. Thus the only case against Madonna consisted of inferences from the use of the car and some tenuous and dubious allegations of earlier similar acts, see *infra* pp. 15-16. Draped in this thin skein of circumstantial suspicion, it was crucial for Madonna that he present to the jury the fullest and most compelling version of his defense. But this he was not allowed to do.

The nature of the defense was that he had rented the car in a false name because he was conducting a clandestine extra-marital affair and the car was for the use of his girl-friend who was flying in from Florida. Witnesses, quite unconnected with the petitioner, testified that Madonna did have a girl-friend with whom he maintained an apartment in Florida. But the testimony that might have proved most convincing, that of Madonna himself, was shut out by the court's ruling that, if he took the stand, he could be impeached by evidence of a prior conviction.

This conviction (originally for murder but later reduced to manslaughter) had been returned twenty-two years earlier, when Madonna was eighteen. At the time of the narcotics trial it was almost nine years since he had been released from prison on the earlier conviction. A pre-trial motion was made by the petitioner that the conviction should not be admitted to impeach him if he should testify. The government did not respond to the motion and the court held no hearing but, nevertheless, denied the motion before the government's case concluded. In the face of this ruling Madonna elected not to testify.

Barred from the stand by this threat of impeachment, Madonna endeavored to show through other witnesses that he had no part in the loan of the rented car to Boriello and that he had no knowledge of any heroin transaction. Two witnesses made a proffer that they had heard Ma-

donna shouting to his co-defendant Larca in an angry manner:

> "How could you lend somebody I don't even know my car?"

This declaration was not offered to show the truth of the assertion contained in it but as circumstantial evidence of Madonna's state of mind. But the trial court held it inadmissible.

While the right arm of the defense was thus amputated, the trial court's rulings improperly sheltered the chief prosecution witness, Boriello. Though Boriello did not inculpate Madonna at all, he did heavily implicate the co-defendant Larca. Madonna could not conceivably have been connected with the charges but for his friendship with Larca, so that discrediting Boriello would have greatly aided Madonna's defense. Boriello's testimony described three trips he had made to Thailand in search of heroin, alleging Larca to be the instigator or financier in each case. But the defense introduced business records of a methadone clinic in New York that showed that Boriello was receiving treatment at the clinic on the dates when he testified he was making the first trip to Thailand. The court received the records in evidence, but, before they were submitted to the jury, summarily reversed the ruling after an *ex parte* conference with certain members of the clinic staff who did not include the person who had made the record entries in question. A request by the defense for an opportunity to summon the person who made the entries for a voir dire was rejected by the court as being likely to cause undue delay.

Gagged as to his defense and with the chief prosecution witness shielded from attack, Madonna was also exposed to the prejudicial impact of prior similar act evidence,

which, for all its gauzy texture and too-good-to-be-true quality, was likely enough to tilt the balance. Over objections by the defense expressed in a timely motion, the court admitted the evidence of one Visceglie, a professional criminal who at the time of his testimony was sharing a cell with Boriello, the chief government witness. Visceglie testified that four and a half years earlier he had had some preliminary negotiations with Larca and Madonna about the sale of heroin. But he also testified that when he once spoke to Madonna about a narcotics deal Madonna said "I'm not in that business". In summation to the jury the prosecutor blandly misquoted this testimony and suggested that Madonna said "I'm not in that business *any more*". The court's only response to a defense objection was to say "All right".

In all instances timely defense motions or objections were made to the trial court. On appeal to the Second Circuit Court of Appeals the main grounds advanced were: (1) the preclusion of the petitioner from testifying by the impeachment ruling; (2) the exclusion of testimony as to the petitioner's angry declaration; (3) the sheltering of Boriello from impeachment by withholding the clinic's business records from the jury; (4) the admission of the evidence of an alleged prior similar act; (5) other areas of prejudice. All these issues were fully briefed. A panel of the Court of Appeals, consisting of Judge Van Graafeiland and District Judges Mishler and Pollack, sitting by designation, affirmed the conviction from the bench, rendering no opinion but delivering the statement that appears in the appendix hereto at pp. 1a-4a.

Reasons for Granting the Writ

This case presents the most compelling of reasons for granting the writ. After a trial in which the court acceded to all government requests and peremptorily dismissed all defense motions, the Court of Appeals was presented with a record and briefs demonstrating grave errors touching basic constitutional rights. The appeal raised very important questions about the Federal Rules of Evidence on which the rulings at the trial were almost plainly wrong. In such a case, and where the defendant had been sentenced to thirty years in prison, the Court of Appeals astonishingly affirmed from the bench and did not write a considered and full opinion. This unfortunate action discredits our system of criminal justice and brings the petitioner to this Court requesting in effect his first review of a conviction that cannot survive serious scrutiny.

I.

The Decision Below Violates Due Process as Elucidated by This Court and Conflicts With Decisions of Other Courts of Appeals as to the Proper Interpretation of Rule 609(a), Federal Rules of Evidence.

The petitioner was precluded from testifying by the court's ruling that a homicide conviction, twenty-two years earlier, could be used to impeach him. Under Rule 609(a), Fed. R. Ev. (App. p. 5a) such a conviction is only admissible to impeach if the court determines that "the probative value of admitting [it] outweighs its prejudicial effect to the defendant". There is ample authority that homicide convictions should not generally be admitted to impeach, especially so stale a one as this. *Inter alia*, see the observation by Judge (now Chief Justice) Burger in

Gordon v. *United States*, 383 F.2d 936, 940 (D.C. Cir.), *cert. denied*, 390 U.S. 1020 (1967), that acts of violence "generally have little or no direct bearing on honesty and veracity".

If this were so in 1967, it is even more plainly now the case for the Federal Rules of Evidence are clearly understood to have shifted the burden of proof to the government with respect to the test under Rule 609(a). 3 Weinstein, *Evidence* 609-67 (1976). But in the present case the only information properly before the judge as to the previous conviction was contained in the defendant's pre-trial motion papers on the point. Those papers simply and accurately described the offense as a murder conviction later reduced to manslaughter by a *coram nobis* proceeding in New York State. The government did not respond to this motion and the court called for no more information. The only source to which the judge could conceivably have looked for details on the previous conviction was a series of remarks made by the prosecutor at pre-trial bail hearings conducted before another judge, the minutes of which may have been examined by the trial judge. But those remarks were tendentious characterizations unsupported by any evidence and would have been strongly challenged by the defense if the judge had not peremptorily denied the motion without making any proper inquiry.

The statement by the Court of Appeals that there was "no abuse of the trial court's discretion" in view of the "manner in which the previous crime occurred" (App. p. 2a) is thus simply inaccurate. While the Court of Appeals may have been correct in stating that an evidentiary hearing is not always necessary in such cases, its decision, on the facts of this case, amounts to holding that an uninformed ruling that an ancient homicide conviction may be admitted to impeach a defendant is an unreviewable

exercise of a trial court's discretion. This holding which is in conflict with other circuits (see *infra*) no doubt stemmed from a misunderstanding of the record by the Court of Appeals. Any such misunderstanding was not the fault of the petitioner. All matters stated here were fully and clearly set forth and argued in the Appendix presented to the Court of Appeals and in the petitioner's main and reply briefs in that court. But the unseemly haste with which the Court of Appeals rushed to judgment may not have afforded it sufficient time to peruse the record and the briefs adequately. This may be evidenced further by the curious remark in the statement delivered by the Court of Appeals that "the defendant did not press for a decision on his motion to preclude" (App. p. 2a). The petitioner filed a formal motion on papers with a supporting memorandum and the trial court denied it before the government's case concluded. It is hard to imagine what more the petitioner should have done.

The holding of the Court of Appeals is in conflict with decisions from other circuits. In *United States* v. *Mahone*, 537 F.2d 922, 928-929 (7th Cir. 1976), the trial court had announced that he would permit the impeachment of the defendant "on the basis of the record now before [the court]". In reviewing this disposition the Seventh Circuit Court of Appeals held that the language of the court below implicitly indicated that it had weighed the prejudicial effect against the probative value. The court went on:

> In the future, to avoid the unnecessary raising of the issue of whether the judge has meaningfully invoked his discretion under Rule 609, we urge trial judges to make such determinations *after a hearing on the record, as the trial judge did in the instant case*, and to explicitly find that the prejudicial effect of the evidence to the defendant will be outweighed by its pro-

> bative value. . . . *Bearing in mind that Rule 609 places the burden of proof on the government* . . . the judge should require a brief recital by the government of the circumstances surrounding the admission of the evidence, and a statement of the date, nature and place of the conviction. *The defendant should be permitted to rebut the government's presentation pointing out to the court the possible prejudicial effect to the defendant if the evidence is admitted.* (Emphasis added). *Id.*

In *United States* v. *Smith*, 551 F.2d 348 (D.C. Cir., 1976), the court reversed, and, in light of the other reasons for its decision, said that it need not assess the independent significance of the lack of an *explicit* finding that probative value outweighed the prejudice to the defendant. But the court went on to say:

> However, it must be obvious to any careful trial judge that an explicit finding in the terms of the Rule can be of great utility, if indeed not required on appellate review. 551 F.2d at 357.

The affirmance from the bench in the instant case thus appears to be contrary to the holding in *Mahone* and the dicta in *Smith*.

The holding below is also in principled conflict with decisions of this Court that have in recent years spoken of the defendant's right to testify as being part of the concept of due process. *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972); *Brooks* v. *Tennessee*, 406 U.S. 605, 613 (1972); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). In *Brooks* v. *Tennessee*, *supra*, this Court invalidated a Tennessee statute requiring a defendant to testify as the first defense witness or not at all. Effectively barring the defendant from the stand by menacing him with the threat of revealing to the jury that he was convicted of a crime of violence when a young man many years ago is a similar impermissible restriction on his right to testify.

Finally, the decision below on this point is in conflict with the principle expressed in *Dorszynski* v. *United States*, 418 U.S. 424 (1974), to the effect that, where a statute requires a "finding" as a predicate to certain action being taken against a defendant, such finding must be made expressly on the record and cannot be implied from the naked ruling or disposition. Federal Rule 609(a) requires a determination that probative value outweighs prejudice. Here the trial court expressed no such determination but baldly denied the petitioner's motion in the one word "Denied". The facts of this case demonstrate dramatically the grave impropriety of such a procedure.

II.

The Exclusion of the Angry Declaration Denied the Petitioner the Right to Call Witnesses in His Favor.

Madonna's overheard out of court declaration, uttered in an angry manner and indicating his surprise and displeasure that Larca had loaned his car to someone Madonna did not know, was offered by the defense as circumstantial evidence that Madonna had an innocent mind at the time of the declaration and, by inference, had no guilty intent when a few hours later he went to retrieve his car. But the trial court excluded it as inadmissible hearsay. This was error and is in conflict with the principles expressed in decisions of this Court and other courts of appeals.

In *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), this Court stated that the hearsay rule "may not be applied

mechanistically to defeat the ends of justice" where "constitutional rights directly affecting the ascertainment of guilt are implicated". The present case is exactly such a one for the ruling, in combination with the impeachment holding, simply denied the defendant the opportunity to present an effective defense.

Nor was this a case where the hearsay rule would have to be substantially bent to accommodate the principles of the sixth amendment. Even apart from constitutional considerations the declaration should have been admitted. Rule 801(c), Federal Rules of Evidence. (App. p. 5a.) The best view is that it was not hearsay at all, for no matters of fact contained in the statement were in issue. The government itself had sought to prove that Madonna had rented the car and that Larca lent it to Boriello and the defense did not challenge these facts. That Madonna did not know Boriello was hardly in dispute, for all that Boriello claimed was that he had once seen Madonna for one minute in Larca's house and perhaps might have met him once twenty years earlier.

The statement was not introduced to prove or disprove any of these matters of fact (which were not in issue), but only to show that after Larca lent the car to Boriello Madonna was in an angry frame of mind consistent with innocence and the nature of his defense. This is not hearsay or, if classified as hearsay, should routinely be admitted under the state-of-mind exception to the hearsay rule, now substantially codified in Rule 803(3) of the Federal Rules of Evidence. App. p. 5a. This was the holding of the Third Circuit Court of Appeals in *Nuttall* v. *Reading Co.*, 235 F.2d 546 (3d Cir. 1956), where testimony as to an angry telephone conversation was admitted to show that the declarant acted thereafter in submission to force.

The trial judge was quite bemused by this question, stating that it constituted "a gray area" with which he was not "entirely familiar". No doubt due to its summary procedure, the Court of Appeals appears to have been hardly more sophisticated in its apprehension of the issues. The statement by the Court of Appeals (App. pp. 2a-3a) shows that it viewed the question through the time-worn lens of the *Hillmon-Shepard*[1] controversy, which petitioner's brief had demonstrated was scarcely relevant. For *Hillmon* had to do with a declaration admitted to show that a future act had been done, and *Shepard* was a case where the prime thrust of admitting the declaration was to show the doing of acts in the past. The present case, where the declaration was proffered only as circumstantial evidence of the petitioner's innocent state of mind, is outside the ambit of that controversy.

The combined effect of the impeachment ruling and the hearsay ruling was to force the petitioner to present a thin and attenuated defense the heart of which had been torn away. The impact of these rulings was both impolitic and unfair, amounting to a violation of the fifth amendment due process right and the sixth amendment right to present favorable testimony.

III.

The Exclusion of the Clinic's Business Records Violated the Petitioner's Right to Confrontation.

The Court of Appeals appears to have concluded (App. p. 3a) that the exclusion of the clinic's records, (that might have shown the chief government witness to be in New York when he testified he was in Thailand planning

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[1] *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285 (1892), and *Shepard* v. *United States*, 290 U.S. 96 (1933).

the crime), was justified because there was evidence before the court that the records were untrustworthy. Rule 803 (6), Federal Rules of Evidence. (App. p. 6a). This observation again must rest on unfamiliarity with the trial record on the part of the Court of Appeals.

The clinic's records had initially been routinely admitted into evidence by the court. In an *ex parte* conference later conducted by the judge with members of the clinic staff, (and possibly a government investigator), it was suggested to the judge that the records were unreliable. The judge then summoned the defendants and counsel to the robing room and announced that he would now exclude the records. Strenuous objections by the defense, who pointed out that the official who had made the record entries was not present and who requested the opportunity to call and examine him, were overruled on the ground that the court would not delay the trial. The defense was thus denied any opportunity to establish the trustworthiness of the records in an adversary proceeding.

The observation by the Court of Appeals that the defense did not object is quite misconceived. The failure to object, if it can properly be so characterized, went only to the initial *ex parte* conference. When the judge announced his reversal of the admission of the records the minutes show that the defense objected vehemently. The point was, indeed, pressed again by the defense in post-verdict motions supported by further affidavits showing the records to be reliable.

This curtailment of confrontation violated the principle expressed in a line of cases in this Court, exemplified by *Davis* v. *Alaska*, 415 U.S. 308 (1974). As in *Davis* the prosecution witness here was a crucial one.

IV.

The Admission of Evidence of a Prior Similar Act, Coupled With Improper Prosecutorial Comment, Violated Due Process and Conflicted With Decisions of Another Court of Appeals.

This Court has never fully reviewed nor even commented substantially on the proper scope of the admissibility of allegations of prior criminal conduct by a defendant. Lacking guidance from this Court, the admission of such evidence in the circuit courts of appeals is marked by considerable diversity, with the Second Circuit Court of Appeals probably authorizing admission on a more generous basis than any other circuit.

The Court of Appeals for the Eighth Circuit has held that, to be admissible, the similar act must be "reasonably close in time to the charge at trial", *United States* v. *Clemons*, 503 F.2d 486, 489 (8th Cir. 1974), and that the evidence of the similar act must be "clear and convincing". *United States* v. *Conley*, 523 F.2d 650, 653-54 (8th Cir. 1975). But in the present case the evidence related to an alleged incident that took place over four years before the trial. It was offered by a professional criminal who was incarcerated in the same cell as the chief government witness and who had everything to gain by concocting a pleasing story for the authorities. Furthermore, the evidence he gave did not allege any completed transaction but referred only to negotiations that were never consummated.

The admission of such tenuous and easily fabricated testimony from so muddied a source is an unfair practice that violates due process. On the facts of this case the unfairness was scored deeper when the prosecutor in his summation flatly misquoted the witness's exculpatory re-

mark, to the effect that Madonna had told him he was not in the narcotics business, by making it appear that Madonna had said he was not in the business "any more". Despite objections from the defense the court did not correct this deadly inversion nor admonish the prosecutor.

V.

The Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings.

One may sympathize with courts who, under the pressure of business, resort more and more to summary affirmances or affirmances from the bench, supported by brief statements sheltered from criticism by not ranking as opinions to be published. But in criminal cases, and especially a case where the outcome for the defendant was so terrible, the practice is fraught with danger. The A.B.A. *Standards Relating to Appellate Courts,* § 3.36 (Tentative Draft, 1976) state:

> A full opinion reciting the facts, the questions presented, and analysis of pertinent authorities and principles, should be rendered in cases involving new or unsettled questions of general importance.

How sharply and sadly the present case exhibits the wisdom of that observation. When the defendant was sentenced to thirty years in prison, when there were the most substantial issues on appeal, when other circuits have reached contrary conclusions, then affirmance from the bench was a departure from usual procedures within the meaning of this Court's Rule 19(1)(b).

In another case, *Arlinghaus* v. *Ritenour*, 543 F.2d 461, 464 (2d Cir. 1976), the Court of Appeals for the Second Circuit observed:

> A decisionmaker obliged to give reasons to support his decisions may find they do not; "the opinion will not write".

If the panel of the Court of Appeals in the present case had heeded that sensible observation, the petitioner would not now have to come to this Court to seek relief from the miscarriage of justice below.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

Statement in the Court of Appeals
For the Second Circuit

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket #77-1001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v—

MATTHEW MADONNA, a/k/a PAUL DEROBERTIS, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO, RICHARD KLINGER,

Defendants,

MATTHEW MADONNA, a/k/a PAUL DEROBERTIS, SALVATORE LARCA,

Defendants-Appellants.

Before:

HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge,* JACOB MISHLER,* and MILTON POLLACK,** *District Judges.*

New York, New York
April 4, 1977

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* Chief Judge, Eastern District of New York.

** Southern District of New York, sitting by designation.

Statement made by the Court at disposition of appeal in open court.

JUDGE VAN GRAAFEILAND:

Counsel, as you know we read the briefs in advance, and we've listened very carefully to the arguments, which were excellent. We're prepared to make our ruling from the bench, and we're going to affirm the conviction. There were several questions raised that I'll comment on just briefly.

Testimony as to the prior conviction meets the requirement of imprisonment in excess of one year and release from prison within ten years under Rule 609. The question was therefore for the Court in the exercise of its discretion as to whether the probative value of the testimony outweighed its prejudicial effect on the defendant. In view of the serious nature of the crime involved and the manner in which it occurred, we see no abuse of the trial court's discretion. There is no requirement in the rules that the trial court must hold an evidentiary hearing whenever the issue of the admissibility of a prior conviction is raised. Since we find no abuse of discretion herein, we need not pass upon the Government's contention that the argument raised by appellant is academic, lacking any indication on defendant's part that he intended to take the stand, or what the nature of his testimony would be. We do note, however, that defendant did not press for a decision on his motion to preclude and that the question raised might therefore well have been academic.

With regard to the statements of Madonna to Larca concerning his automobile, the testimony of Larca and Battista as to Madonna's alleged statement to Larca concerning his car was properly excluded in the discretion of the trial

court. If the inference which the defendant wished the jury to draw from this testimony was that Madonna was simply going to the rendezvous to recover his car, or that he had not rented the car for the purpose of lending it to Boriello, then the statement was hearsay. If the statement was not offered for this purpose, it had no probative value. We do not feel that this alleged statement comes within the provisions of Rule 803(3) because it did not deal with the defendant's then existing mental, emotional or physical condition. It was, in fact, a statement of memory of a past event.

With regard to the admission of Visceglia's testimony, it is the settled rule of this court that evidence of prior offenses is admissible, unless offered only for the purpose of showing defendant's criminal character, or unless its potential for prejudicing the defendant outweighs its probative value. The testimony as to Madonna's and Larca's previous joint participation in the proposed sale of narcotics was admissible for the purpose of showing the intention of the parties in the instant case, within the exercise of the District Court's broad discretion.

With regard to the Einstein Hospital records, because there was substantial evidence before the District Court that the copies of the hospital records indicated a lack of trustworthiness within the meaning of Rule 803(8) of the Federal Rules of Evidence, the Court was justified in the exercise of its discretion in excluding them. We conclude from reading the record that the Court's reference to D.E.A. agent Meale at page 1844 was, in actuality, intended as a reference to Mr. Marion who was requested in the same statement to put his remarks on the record. In affirming with regard to this point, we do not intend to indicate our approval of the procedure followed by the

District Judge in conferring with the witnesses in chamber in the absence of counsel; but it appears from the record that no objection was made by counsel to this procedure.

With regard to the Portman-Klinger tapes, concerning which no argument was made in court this morning, probably for lack of time, in view of Klinger's statements that he did not know the parties involved and intended the "Godfather" references only as a joke, and the District Court's careful limiting instructions, we do not find that the admission of this taped conversation constituted prejudicial and reversible error.

We find all other allegations of error to be without substance and we therefore affirm.

Statutes and Rules Involved

Federal Rules of Evidence

Rule 609(a)

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Rule 801(c)

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 803(3) and 803(6)

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execu-

tion, revocation, identification or terms of declarant's will.

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Nos. 76-1822 and 76-1859

In the Supreme Court of the United States

OCTOBER TERM, 1977

MATTHEW MADONNA, PETITIONER

v.

UNITED STATES OF AMERICA

SALVATORE LARCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The oral statement of the court of appeals (Pet. App. 1a-4a)[1] is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1977. Petitions for rehearing were denied on May 27, 1977. The petitions for a writ of certiorari were

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[1]Unless otherwise noted, "Pet." refers to the petition in No. 76-1822.

filed on June 22, 1977 (No. 76-1822) and June 27, 1977 (No. 76-1859). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in excluding business records as unreliable.

2. Whether the district court erred in excluding an out-of-court declaration by petitioner Madonna as hearsay.

3. Whether the district court erred in admitting evidence of a prior similar act.

4. Whether petitioner Madonna's right to testify in his own defense was improperly "chilled" by the district court's ruling that a prior homicide conviction could be used against him for impeachment purposes.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to import, distribute and possess with intent to distribute heroin, in violation of 21 U.S.C. 846 and 963, and possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Madonna was sentenced to consecutive terms of 15 years' imprisonment on each count, to be followed by a three-year special parole term, and was fined $25,000. Petitioner Larca was given concurrent sentences of 15 years' imprisonment and three years' special parole. The court of appeals affirmed from the bench after oral argument, with a statement of reasons provided by the presiding judge (Pet. App. 1a-4a). See Rule 0.23, Rules of the United States Court of Appeals for the Second Circuit.

The government's evidence at trial, which was presented through 60 exhibits and the testimony of 24 witnesses, established that from May 1, 1976, through August 31, 1976, petitioners and their co-conspirators conspired to import about $10 million worth of pure heroin from Bangkok, Thailand, to New York via Honolulu, concealed in false-sided suitcases and carried by couriers. The key witness for the government was co-defendant Joseph Boriello, who had pleaded guilty prior to trial. Boriello testified that he traveled to Bangkok in April 1976, acquired a sample of pure heroin, and smuggled the narcotics into the United States during late April or early May (Tr. 109-116, 242-244). After Boriello showed the drugs to petitioner Larca, the men agreed that Boriello would attempt to smuggle a kilogram of heroin into this country from Thailand through use of a courier and would deliver it to Larca. This plan was successfully completed in June 1976 (Tr. 116-135.) Soon thereafter, petitioner Larca and Boriello discussed additional trips to the Far East. Boriello agreed to recruit the couriers, while petitioner Larca agreed to furnish special false-sided suitcases for use in transporting the heroin (Tr. 135-136). Pursuant to this scheme, Boriello recruited two individuals named Gene Travers and Jan Portman (Tr. 151-154, 446-450, 551-554, 595, 681-684), each of whom was interviewed and approved by petitioner Larca (Tr. 151-159, 682-691).

Toward the end of July 1976, Boriello purchased ten kilograms of heroin from his source in Bangkok for $65,000 (Tr. 176-177, 697). Travers and Portman then separately left New York for Bangkok, picked up the narcotics, and transported them to the United States in the false-sided suitcases (Tr. 476, 701). However, both couriers were detected and arrested when they went through customs in Honolulu on August 17 and 18,

1976 (Tr. 702, 732-734). Immediately upon their arrests, Portman and Travers agreed to cooperate with agents of the Drug Enforcement Administration by making a controlled delivery of the suitcases (which had been repacked by D.E.A. agents with flour, sugar and a small amount of the heroin) to Boriello in New York (Tr. 476-478, 565-569, 576-578, 702, 732-737).

On August 20, 1976, Boriello called Travers in accordance with their prearranged plan and told him to stay home for the day (Tr. 187-188, 195-196, 703). Later that afternoon, Boriello visited petitioner Larca and was given an automobile in which to pick up the heroin (Tr. 211, 217, 779-781, 843-845, 936-937). This vehicle had been rented on the previous day by petitioner Madonna using an assumed name (Tr. 648-652; G.X. 35A, 35B). Boriello then drove to Travers' apartment, obtained the suitcases, and began loading the luggage into the rented automobile (Tr. 222-224, 882). At that point D.E.A. agents arrested Boriello, who also agreed to cooperate with the investigation (Tr. 221-226).

Under surveillance by the agents, Boriello drove the automobile to a prearranged meeting spot, where petitioners took delivery of the car and instructed Boriello to return home (Tr. 228, 861, 886, 950). As petitioners entered the automobile containing the suitcases with the real and bogus heroin, they were arrested (Tr. 886-889, 961-962).

ARGUMENT

1. In an effort to prove that Boriello had received treatment at a methodone clinic in New York during the period he alleged he had been in Thailand, petitioner Larca sought to introduce expurgated xerographic copies of the clinic's records for various dates between April 15 and April 26, 1976 (Tr. 1738). The trial judge admitted

the documents on the apparent understanding that officials of the hospital would be available to demonstrate their authenticity and trustworthiness (Tr. 1740). Later in the trial, during summation, the judge informed counsel that clinic officials would be meeting with him in chambers during the lunch break to discuss the records (Tr. 1842). Petitioners' counsel did not object.

After meeting *ex parte* with the court, one of the officials explained in detail and on the record that the documents introduced by petitioners related only to billing rather than to a patient's actual presence and hence did not support the inference that Boriello had been in New York during the period in question. After defense counsel had examined the official (Tr. 1844-1852), the court excluded the documents, ruling that they were unreliable for the purpose for which they had been offered (Tr. 1852-1853). Petitioners contend (Pet. 13-14; Pet. No. 76-1859, pp. 12-14) that the district court erred both in refusing to admit the clinic records and in failing to afford them an opportunity to examine the individual who had made the record entries.

The district court acted within its discretion in excluding the documents. Rule 803(6) of the Federal Rules of Evidence permits the admission of business records only if they are trustworthy, and the testimony of the clinic official established that these records were not reliable for the purpose for which petitioner Larca had attempted to use them. Nor was their trustworthiness shown, as petitioner Larca suggests (Pet. No. 76-1859, pp. 10-11), by the post-verdict letter from a clinic official stating that Boriello's presence on certain dates in April 1976 could be inferred from other "secondary sources." Whatever inferences might properly have been drawn from the secondary sources themselves in regard to Boriello's

presence at or absence from the clinic, these sources in no way suggested that his presence could be reliably inferred from the documents that petitioner Larca offered into evidence. Indeed, the "secondary sources" confirmed that the business records petitioner Larca sought to have admitted did not "speak directly to the issue of attendance during the time in question" (Tr. 2130). Furthermore, there is no merit to the claim that the court abused its discretion in not deferring its ruling until petitioner Larca called the individual who had made the document entries. The proper time to have laid an adequate foundation for the admission of the documents was when they were introduced, not after both sides had rested and summations had begun.

In any event, even if the district court should not have excluded the records, the error was harmless. Their only function was to attack the credibility of Boriello's testimony that his initial trip to Thailand had occurred in April 1976; the records said nothing about his far more damaging testimony that he had made subsequent trips to Thailand with petitioner Larca's connivance to arrange the smuggling of heroin. It was undisputed that the heroin that Boriello had smuggled into the country using Travers and Portman as couriers was discovered by customs officials in Honolulu and that part of the same shipment of heroin was thereafter seized by surveiling D.E.A. agents while in the possession of Boriello and petitioners. Hence, even if the clinic's records had been admitted, at most they would have indicated that Boriello was mistaken in his recollection of the date of his first trip to Thailand, a fact that was of little significance.

2. As proof that he had had no part in petitioner Larca's loan of the rented automobile to Boriello and no knowledge of any heroin transaction, petitioner Madonna proffered the testimony of two witnesses that they had

heard him shout to Larca in an angry manner, "How could you lend somebody I don't even know my car?" (Pet. 5). Petitioner Madonna claims (Pet. 11-13) that the district court erred in excluding this testimony, contending that the declaration had been offered as evidence of his state of mind rather than to prove the truth of the matter asserted and that it therefore was admissible under Fed. R. Evid. 803(3) as an exception to the hearsay rule.

The declaration, however, went beyond establishing that petitioner Madonna's state of mind was one of anger—a matter that bore little relevance to the factual issues in the case, as the presiding judge of the court of appeals pointed out in his statement from the bench (Pet. App. 3a), and that was in any event proven by other evidence (see Tr. 1256-1257, 1285-1286). Rather, the main thrust of the declaration, as petitioner himself acknowledges (Pet. 4-5), was to show the purported reason for the anger—*i.e.*, that petitioner Larca had loaned the automobile to Boriello without consulting petitioner Madonna—and hence inferentially to establish petitioner Madonna's lack of involvement in the heroin transaction. Since the effect of the declaration would thus have been to prove a past fact by hearsay testimony rather than to indicate petitioner Madonna's then-existing state of mind or future intent,[2] it was properly excluded. See *Shepard* v. *United States*, 290 U.S. 96, 105-106.[3]

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[2] *Nuttal* v. *Reading Company*, 235 F. 2d 546 (C.A. 3), cited by petitioner (Pet. 12), involved declarations that tended to prove the declarant's future intent. See also *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285.

[3] Contrary to petitioner Madonna's suggestion (Pet. 13), the *Shepard* rule is not "time-worn." *Shepard* was explicitly cited in the Notes of the Advisory Committee on Rule 803(3) of the Federal Rules of Evidence in explaining that, "to avoid the virtual destruction of the hearsay rule," proof of state of mind by a hearsay statement is not to be allowed if the statement is capable of serving "as the basis for an inference of the happening of the event which produced the state of mind."

3. Petitioner Madonna claims (Pet. 15-16) that the district court erred in admitting prior similar act evidence. At trial, Nicholas Visceglie testified that in 1972 petitioner Madonna had offered to sell him several kilograms of heroin, using petitioner Larca as an intermediary, but that the transaction was unsuccessful because Visceglie had been unable to raise the purchase money (Tr. 1078-1092). This testimony was plainly admissible.

Rule 404(b), Fed. R. Evid., provides that evidence of other crimes, wrongs, or acts may be admitted "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." See *Andresen* v. *Maryland,* 427 U.S. 463, 483-484. The prior act evidence in this case, as the presiding judge of the court of appeals observed (Pet. App. 3a), was extremely relevant to prove petitioners' criminal intent and the absence of mistake, since it indicated that petitioner Madonna's relationship with petitioner Larca was not an innocent one and that the meeting with Boriello was not a "mistake" (as the defense sought to prove), and it supported the government's allegation that petitioner Madonna was the senior and silent partner in petitioner Larca's narcotics activities.

Although the trial judge has discretion to exclude evidence of prior acts that are too remote in time or are inadequately substantiated, the judge did not abuse his discretion here. The incident that Visceglie described had occurred only four years earlier, and it was related by a person with first-hand knowledge of the event. Petitioner Madonna's complaint that the testimony was given "by a professional criminal who was incarcerated in the same cell as the chief government witness and who had everything to gain by concocting a pleasing story for the authorities" (Pet. 15) misses the point. This argument goes only to Visceglie's credibility, which was a matter for the

jury. Cases such as *United States* v. *Clemons,* 503 F. 2d 486 (C.A. 8), do not suggest that the witness's credibility must be "clear and convincing"; they require only that his testimony, if believed, must constitute "clear and convincing proof of other similar criminal conduct" (*id.* at 490). The narcotics negotiations to which Visceglie testified clearly satisfied that requirement.

4. Finally, there is no support in the record for petitioner Madonna's contention (Pet. 7-11) that his right to testify was "chilled" by the district court's refusal to preclude use against him for impeachment purposes of a prior homicide conviction. When the matter was initially discussed at a pretrial conference, the court remarked that it did not "have to decide that now" (Tr. 15). Petitioner never renewed his motion, and while the court's formal denial of the motion was dated November 9, 1976, the day before the government's case was completed, the ruling was not actually filed until November 15, after all parties had summed up. Since petitioner Madonna never requested a decision on his motion after the court's initial deferral, and since nothing in the record indicates that he learned of the court's ruling before it was filed, it is extremely unlikely that the ruling played any part in his decision not to testify. Indeed, not only did petitioner never assert below that he would have taken the stand but for the district court's ruling, but also there is substantial evidence that he never actually intended to testify on his own behalf. See August 31, 1976, Tr. 30-31; Tr. 979, 1561.

In any event, the district court's ruling was correct. The homicide for which petitioner Madonna had been convicted was not an "act of violence [resulting] from a short temper, a combative nature, extreme provocation, or other causes," which was held in *Gordon* v. *United*

States, 383 F. 2d 936, 940 (C.A. D.C.), certiorari denied, 390 U.S. 1029, to "have little or no direct bearing on honesty and veracity." Rather, it was a cold-blooded killing of a person who had owed petitioner's brother $900 in a narcotics transaction (Tr. 2087, 2165-2166).[4] Proof that a defendant once committed an offense of that nature suggests that he would not hesitate to testify untruthfully in his own defense. See 120 Cong. Rec. S19909 (daily ed., November 22, 1974) (remarks of Sen. McClellan).

Furthermore, use of the homicide conviction for impeachment purposes was permitted by Rule 609, Fed. R. Evid. Petitioner's conviction was punishable by imprisonment for more than one year, he had been released from confinement less than ten years before trial, and both the district court and the court of appeals (Pet. App. 2a) concluded that the probative value of the evidence outweighed its prejudicial effect. Although the trial judge did not make an explicit finding to that effect—a result that is entirely understandable in view of petitioner's failure to press for a ruling on his motion—nothing in the Rule mandates that procedure. Moreover, unlike *Dorszynski* v. *United States*, 418 U.S. 424, or *United States* v. *Smith*, 551 F. 2d 348 (C.A. D.C.), this was not a case in which the district court may have been unaware of its options or of the applicable legal standards; petitioner's

[4]Contrary to petitioner's assertion (Pet. 8), the facts of this homicide had been fully presented to the trial judge during the pretrial bail proceedings (August 24, 1976, Tr. 10; August 31, 1976, Tr. 12; September 2, 1976, Tr. 342; September 3, 1976, Tr. 123, 341, 373). The subsequent reduction of the first-degree murder conviction to manslaughter was the result of a writ of *coram nobis* filed after petitioner had been released on parole and had been charged with a parole violation.

motion and memorandum of law had expressly relied on Rule 609, and the court's denial of the motion therefore clearly signaled its determination that the Rule allowed the conviction to be used for impeachment.[5]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1977.

[5]Petitioner Madonna's contention (Pet. 16-17) that the court below erred in affirming his conviction from the bench is insubstantial. Not only is there no requirement that appellate courts write opinions (see *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4), especially in cases of summary affirmances, but also here the court of appeals gave an oral statement of the reasons for its decision.

DOJ-1977-09

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1822

MATTHEW MADONNA,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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September 27, 1977

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1822

MATTHEW MADONNA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

The Government's answer, narrowly contesting each separate argument of the petitioner, quite fails to dispel the cloud of unfairness that hangs over this conviction. For the essential capitulation of the defense position is that a series of rulings, expansively in favor of the Government but denying, in a crabbed fashion, all offers to present the heart of the defense case, violated due process and resulted in a conviction that cannot safely stand.

1. The Government's argument on the exclusion of the records of the clinic will be responded to more fully in a Reply to be filed by petitioner, Larca. Here it need only be said that the Government writes as if the chronology and circumstances were orchestrated by the defense. But, as the Government's Answer shows, it was the court that initially postponed the inquiry into the reliability

of the records, the court that then held an *ex parte* meeting with some officials of the clinic, the court that then peremptorily reversed the decision to admit the evidence and the court that denied the defense any opportunity to present testimony as to the reliability of the records. With all these matters tightly managed by the court, the defense simply was not permitted to demonstrate the worth of evidence that might have shown that a vital link in the story of the chief government witness was a fabrication.

2. The Government argues in its Answer (pp. 6-7), that the out-of-court declarations Madonna sought to introduce were properly excluded since they went to prove past fact by hearsay testimony, a procedure condemned in *Shepard* v. *United States*, 290 U.S. 96 (1933). But in *Shepard* the declaration in issue was offered *against* the defendant to prove his guilt of murder and consisted of a statement by the victim, while ill, that "Dr. Shepard has poisoned me". This Court held that the statement was improperly admitted because it was an accusation from beyond the grave, founded on mere suspicion, and not offered to prove the present or past feelings of the declarant but rather "as proof of an act committed by someone else". 290 U.S. at 104. The essence of the error was that the jury could only view the declaration as a charge by the victim that the defendant killed her. *Id.*

The present case is utterly different. Here a defendant sought to introduce testimony as to his own previous declaration to show that admitted acts were done with an innocent state of mind. Madonna never questioned Government proof that Larca loaned the car to Boriello, nor that he accompanied Larca to a rendezvous to retrieve the car. All that was in issue was whether this was done with a felonious intent. Barred from taking the stand himself, this was his only way of demonstrating an innocent state of mind. *Shepard* rests on the fundamental unfairness of allowing hearsay accusations into the trial to damn the accused. But here the unfairness goes all the other way. Evidence as to innocent intent, the credibility of which could well have been evaluated by the jury, was excluded. Nothing in the hearsay rule, and judicial discretion to apply that rule, can justify such an emasculation of the defense case.

Contrary to the Government's argument this case is on all fours with *Nuttall* v. *Reading Co.*, 235 F.2d 546 (3d Cir. 1956). The question in *Nuttall* was with what intent or in what state of mind the speaker did a future act, just as here the questions were: (a) what was Madonna's state of mind when he made the declarations, (b) what evidence was that of his state of mind when he retook possession of his car. A passage in *Nuttall* clinches its relevance to the instant case:

> . . . [T]he fact of a conversation in which the speaker was protesting and at the end of which he looked angry and clenched his fists is circumstantial evidence to prove that what he did thereafter was in submission to the force which he thought had been exerted. All of this is not an exception to the hearsay rule at all . . .
>
> In this instance, however, it matters not whether the evidence was hearsay. One of the exceptions to the rule excluding hearsay is that a man's declarations as to his state of mind may be used to establish that state of mind and, to some degree, such other things as proof of a state of mind tends to establish. *Id.* at 551.

In a criminal case, where the notion of due process governs, the arguments against exclusion are all the stronger. Here, where the Government was allowed to introduce tenuous and suspect evidence of alleged prior

similar acts, the exclusion of the evidence of the innocent mind was unconscionably harsh and deeply questions the fairness of the trial and the verdict of guilty.

3. The Government argues, (Ans. 8-9), that the admission of the evidence of alleged prior similar acts was within the court's discretion. But that discretion has "definite limits". *United States* v. *Turquitt*, 557 F.2d 464, 470 (1977):

> It does not suffice simply to see if the evidence is capable of being fitted within an exception to the rule. Rather, a balancing test must be applied. The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the Government's case and it must also be plain, clear and conclusive . . . (citations omitted), *Id.* at 468-69.

Here the evidence was dubious, somewhat internally contradictory, and further distorted by improper Government comments in summation. Petition at 15-16. Further, in examining the balance, the admission of the evidence cannot be considered *in vacuo*. It must be set by the side of the exclusion of the declarations of innocent intent, the barring of the defendant from the stand and the sheltering of the chief government witness from full cross-examination. Viewed in this total picture the scales register an unfair outcome.

4. On the argument that the court's ruling, permitting evidence of a prior conviction for homicide to impeach, was incorrect, the Government's answer is curious as to the law and misleading as to the facts. The Government suggests, (Ans. 9-10), that the petitioner never "renewed" his motion, that the denial of the motion was not "filed" until after the parties had summed up, and that it is unlikely that the ruling played any part in the petitioner's decision not to testify.

But the endorsement on the notice of motion, (a copy of which was included in the petitioner's appendix in the court of appeals), states that the ruling was made before the Government's case concluded "as indicated on the record". Notice can surely be taken of the fact that orders often lie for days in the clerk's office before filing. While it is true that the trial transcript on examination does not reveal the ruling, the court itself in its endorsement stated that the denial was indicated on the record. The petitioner was obviously unable at an appellate stage to challenge the accuracy of the transcript. The Government position appears to be that, where no evidentiary hearing is possible, every conceivable inference is to be made against the petitioner.

A much more reasonable approach would be to take the whole record as it stands. This demonstrates that a full and timely motion was made, that the court denied it in a ruling made before the Government's case concluded and that the court stated that this ruling had been made on the record. To ignore all this and suggest that the defendant has somehow failed at the appellate level, where no such opportunity exists, to prove a causal connection between the adverse ruling and his decision not to take the stand is a wholly perverse approach. The suggestion that "petitioner never renewed his motion" (Ans. 9) is quite misleading. What obligation was there to renew a motion that had been timely made and denied?

The Government further argues that, in any event, the denial of the motion was proper since the prior crime was not just an angry, random killing but was a vengeance murder for failure by the victim to pay a debt to petitioner's brother arising out of a narcotics transaction. But the Government refers here to nothing more than statements made by the prosecutor at *a post-verdict hearing*. This is a sorry assertion for petitioner fully demonstrated to the court of appeals (and see Petition 8)

that: (a) such a characterization of the previous crime was only an unsupported allegation by the prosecutor; (b) that the petitioner never was given any opportunity to challenge this in an evidentiary hearing; (c) that, had such an opportunity been afforded, the petitioner would have strongly contested this description of the killing; and (d) that there was no proof that the trial judge had even seen the transcripts of the bail hearings where there had been some mention of the previous conviction. Indeed, the transcript references to pre-trial bail hearings given by the Government (Ans. 10 n. 4) do not in any way bear out the proposition in the text of the footnote that the "facts of this homicide had been fully presented to the trial judge." They contain little more than bare references to the fact of a previous conviction for homicide.

In the end then, the Government's position is that, where no inquiry was made and where no hearing was held, all assertions now made by the Government must be believed. Nothing in law or justice can countenance such a proposition.

CONCLUSION

The court should grant the petition for certiorari.

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